Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

AIRBUS INDUSTRIE, et al.,
Petitioners,

vs.

LAURA HOWELL LINTON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

How should the courts determine majority government ownership in an "instrumentality of a foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-1611 (1994)?

PARTIES TO THE PROCEEDING

Petitioners are Airbus Industrie, GIE and Aeroformation, GIE.[1] Petitioners are defendants in the underlying litigation now pending in the 23rd Judicial District Court of Brazoria County, Texas, and were the respondents in the Texas Court of Appeals appellate proceeding from which this petition for writ of certiorari arises.

Respondents are Laura Howell Linton, individually and as the personal representative of the Estates of Andrew Jay Howell and Sarah Stoll Howell, Deceased, and on behalf of Rena Howell, Margaret F. Howell, Nell Jones and any other proper legal beneficiaries of Andrew Jay Howell and Sarah Stoll Howell; Rena Howell, individually, Margaret F. Howell, individually, and Nell Jones, individually; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani), individually and as executors and personal representatives of the Estates of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani, Deceased, and on behalf of and as the next friends of Tulsi Vaghjiani and on behalf of Lalji Karsan

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[1] Petitioner Airbus Industrie is a *Groupement d'Interet Economique* (GIE) under French law, which is a legally separate entity resembling a partnership of companies. *See* fn.4, *infra*. Its member companies are Aerospatiale Societe Nationale Industrielle ("Aerospatiale") (which has a 37.9% interest in Petitioner); British Aerospace (Operations) Ltd. (which has a 20.0% interest in Petitioner); DaimlerChrysler Aerospace Airbus GmbH (formerly known as "Deutsche Airbus", by which it is referred to in the lower court proceedings and will be referred to in this Petition so as to avoid confusion) (which has a 37.9% interest in Petitioner); and Construcciones Aeronautics S.A. ("CASA")(which has a 4.2% interest in Petitioner).

Petitioner Aeroformation was a GIE which was dissolved in 1994 and therefore has no parent companies or nonwholly owned subsidiaries. Airbus Industrie held a 90% interest in Aeroformation, with the remaining 10% interest being held by a private company, Flight Safety International.

Vekaria and Kanbai Lalji Vekaria and any other proper legal beneficiaries of Dhanji R. Vaghjiani, Premila D. Vaghjiani, and Kamlesh Vaghjiani; Ratna Patel (Vaghjiani) and Valbai Patel (Vaghjiani) as the next friends of Tulsi Vaghjiani, individually, Lalji Karsan Vekaria, individually, and as the executors and personal representatives of the Estate of Rakhee J. Patel, Deceased, and on behalf of and as the next Friends of Deena J. Patel and any other proper legal beneficiaries of Rakhee J. Patel; Neeta J. Patel and Jaisukh A. Patel and as the next best friends of Deena J. Patel, individually; and Mr. & Mrs. Stan Moss, individually and as Temporary Administrators of the Estate of Alison Leslie Moss. Respondents are plaintiffs in the underlying litigation now pending in the 23rd Judicial District Court of Brazoria County, Texas, and were the appellants in the Texas Court of Appeals appellate proceeding.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Airbus Industrie ("Airbus") and Aeroformation (collectively the "Airbus Defendants") respectfully pray that a writ of certiorari issue to review the decision of the Texas Fourteenth Court of Appeals dated September 12, 1996. The Texas Fourteenth Court of Appeals reversed the Order of the 23rd Judicial District Court of Brazoria County, Texas, that the Airbus Defendants were immune from the jurisdiction of all United States courts under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1602-1611 (1994). The Airbus Defendants subsequently sought review by the Supreme Court of Texas, which declined to exercise its discretionary right to hear the appeal and denied the Airbus Defendants' Petition for Rehearing on October 1, 1998.

OPINIONS AND ORDERS BELOW

The October 1, 1998, order of the Supreme Court of Texas denying the Airbus Defendants' Petition for Rehearing is not reported, and is reprinted as Appendix A hereto.

The order of the Supreme Court of Texas denying the Airbus Defendants' Application for Writ of Error is not reported and is reprinted as Appendix B hereto.

The order of the Texas Fourteenth Court of Appeals denying the Airbus Defendants' motion for *en banc* consideration is not reported and is reprinted as Appendix C hereto.

The order of the Texas Fourteenth Court of Appeals denying the Airbus Defendants' motion for rehearing is not reported and is reprinted as Appendix D hereto.

The order of the Texas Fourteenth Court of Appeals reversing the judgment of the trial court and denying immunity under the FSIA to the Airbus Defendants is reported at *Linton v. Airbus Industrie*, 934 S.W.2d 754 (Tex. App. 1996), and is reprinted as Appendix E hereto.

The order of the 23rd Judicial District Court of Brazoria County, Texas, granting the Airbus Defendants' motion to dismiss for lack of jurisdiction under the FSIA is not reported and is reprinted as Appendix F hereto.[1]

JURISDICTION OF THIS COURT

This petition for a writ of certiorari seeks review of the September 12, 1996, decision of the Texas Fourteenth Court of Appeal, which held that the Airbus Defendants were not instrumentalities of a foreign state and therefore were not immune under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1994), and reversed the trial court's order dismissing the action against the Airbus Defendants.

Petitioners filed a timely Application for Writ of Error to the Supreme Court of Texas, which declined to exercise its discretion to review the matter. Petitioners thereafter filed a timely Petition for Rehearing. The Supreme Court of Texas denied the Petition for Rehearing on October 1, 1998. Jurisdiction of this Court to

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[1] The 23rd Judicial District Court decision followed a remand of this action by the U.S. District Court for the Southern District of Texas. This action had an extensive history in the federal courts which is not relevant to this petition, and which is therefore omitted.

review the decision of the Texas Court of Appeals is invoked under 28 U.S.C. § 1257(a) (1994). *See Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968).

STATUTORY PROVISIONS INVOLVED

Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1994):

> **§ 1604. Immunity of a foreign state from jurisdiction**
>
> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1603 (a), (b) (1994):

> **§ 1603. Definitions**
>
> For purposes of this chapter —
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity —
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political

subdivision thereof, and

> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Decree No. 67-821 of September 23, 1967, J.O., September 28, 1967, p. 9537 (as amended):

> [A translation of the French statute governing the creation and operation of a GIE is set forth in Appendix G.]

STATEMENT OF THE CASE

This case arises out of the crash near Bangalore, India, of an Airbus A320 model aircraft. The aircraft was assembled by Airbus in France and was delivered to Indian Airlines in France. It was operated in India by Indian Airlines using crews of Indian nationals, most of whom had been trained in India by Indian Airlines and some of whom had received some training in France from Aeroformation. The crash was investigated in India by Indian government authorities, who concluded that the crash was caused solely by pilot error. None of the passengers or crew were residents of the United States.

Despite the complete lack of any connection of the accident with either the State of Texas or, for that matter, the United States, the Plaintiffs instituted two separate actions in the 23rd Judicial District Court of Brazoria County in Angleton, Texas.[2] Both actions

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[2] The defense of *forum non conveniens* is not available to the Airbus Defendants in Texas state court. *See Dow Chem. Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). Although the Texas Legislature (continued)

were timely removed by the Airbus Defendants to the United States District Court for the Southern District of Texas and consolidated. Jurisdiction for removal was based on two independent grounds of federal court jurisdiction: (1) diversity jurisdiction under 28 U.S.C. § 1332 (1994), because all the United States parties, Plaintiffs, and Defendants, were diverse, and the foreign parties were additional parties; and (2) federal question jurisdiction under the FSIA, 28 U.S.C. § 1330(a) (1994), and 28 U.S.C. § 1441(d) (1994), because the Airbus Defendants were agencies or instrumentalities of foreign states. After removal, the Plaintiffs filed motions to remand their respective actions to state court. The motions to remand were granted, and Petitioners appealed the remand order to the Fifth Circuit. The Fifth Circuit ultimately decided it lacked jurisdiction to hear the Airbus Defendants' appeal of the remand because it was not a final order. *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994).

As soon as the action was returned to the Brazoria County court, the Airbus Defendants entered special appearances and moved to dismiss the action for lack of personal and subject matter jurisdiction upon the ground that they were agencies or instrumentalities of a foreign state, and thus immune under the FSIA.

On February 9, 1995, the 23rd Judicial District Court of Brazoria County entered an Order granting the Airbus Defendants' motion to dismiss. The Order adjudged that

> Defendants Airbus Industrie and Aeroformation are foreign states under the Foreign Sovereign

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(fn. continued)
legislatively overruled *Alfaro*, Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (1986 & Supp. 1999), the new statute does not apply to this case because it was filed before September 1, 1993, the effective date of the new statute.

> Immunity Act, 28 U.S.C. § 1602, *et seq.*, and that no exceptions to the FSIA apply; therefore, Defendents Airbus Industrie and Aeroformation are absolutely immune from suit in the United States.

Appendix F. It further ordered that "this case is dismissed for lack of subject matter jurisdiction over Airbus Industries (sic) and Aeroformation." *Id.*

The plaintiffs filed a timely appeal to the Texas Fourteenth Court of Appeals.[3] That court reversed the decision of the Brazoria County court, holding that Respondents were *not* instrumentalities of a foreign state entitled to immunity under the FSIA. The Court of Appeals reasoned that although the overall total ownership shares of the French, German and Spanish governments in the member companies of Airbus exceeded 60%, the German governmental ownership share of Deutsche Airbus, the German member company of Airbus, was only 49.25%, and thus had to be excluded from the FSIA calculation because Deutsche Airbus did not itself qualify as an agency or instrumentality of a foreign state under the FSIA. As the combined French and Spanish government ownership shares in the French and Spanish member companies, Aerospatiale and CASA, totaled less than 50% of Airbus, Airbus did not qualify as an instrumentality of a foreign state under the FSIA. Similarly, the Airbus 90% membership interest in Aeroformation could not be considered, and Aeroformation thus also did not qualify under the FSIA.

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[3] Plaintiffs appealed only the portion of the Order that held that Petitioners were instrumentalities of a foreign state. The finding that there were no applicable exceptions to the FSIA's grant of immunity in connection with the crash is therefore final.

The Airbus Defendants filed a timely Application for Writ of Error to the Supreme Court of Texas. The Supreme Court of Texas denied the Application, and on October 1, 1998, denied the Airbus Defendants' Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURT'S REFUSAL TO RECOGNIZE PETITIONERS AS INSTRUMENTALITIES OF A FOREIGN STATE IS CONTRARY TO THE MANDATE OF THE FSIA, AND FURTHER ADDS TO THE SPLIT OF AUTHORITY OF THE COURTS ON THE SCOPE OF FSIA IMMUNITY

This Court should grant the requested writ because the decision of the Texas Court of Appeals denying foreign sovereign status to Petitioner is contrary to the mandate of the Foreign Sovereign Immunities Act of 1976 ("FSIA"). The writ should also be granted so that this Court may resolve multiple conflicts between the decisions of the Texas Court of Appeals, the Fifth, Seventh and Ninth Circuits and the Appellate Division of the New York Supreme Court, as to how the percentage of foreign government ownership should be calculated for purposes of determining whether a party is an instrumentality of a foreign state under the FSIA.

As this Court has previously recognized, when Congress enacted the FSIA, one of its express goals was to develop a "uniform body of law" applicable to actions against foreign states in view of the potential sensitivity of such actions. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983).

Review by this Court is needed because each of the above courts has adopted rules for the calculation of governmental ownership which are different and irreconcilable, and which result in inconsistent determinations as to the same party depending solely upon the court in which the lawsuit is filed. Indeed, Petitioner Airbus has been found to be an instrumentality of a foreign state in the Southern District of Texas in Houston, *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 531 (S.D. Tex. 1994), but not in the state courts of Texas in this action. It has been found to be an instrumentality of a foreign state in one courtroom of the Southern District of New York, *Spengel v. Airbus Industrie G.I.E.*, 1997 U.S. Dist. LEXIS 8987 (S.D.N.Y.), but would not be in another courtroom of that District pursuant to the holding of *Gardiner Stone Hunter v. Iberia Lineas Aereas*, 696 F. Supp. 125, 132 (S.D.N.Y. 1995), or in the New York state courts pursuant to the holding of *United Arab Shipping Co. (S.A.G.) v. Salman Al-Hashim*, 176 A.D.2d 569, 574 N.Y.S.2d 743 (1991).

Unless this Court grants review, this multiplicity of inconsistent rules will continue, and the intent of Congress that there be a uniform body of law in this area will be frustrated, with substantial adverse effects on the foreign relations of this country.

A. Congress Intended That There be a Uniformity of Decision by the Courts Under the FSIA

In the legislative history of the FSIA, Congress repeatedly emphasized the importance of a uniform body of law being created for actions against foreign states.

First, in explaining why it was providing for Federal court jurisdiction in such actions, Congress stated:

> Such broad jurisdiction in Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.

H.R. Rep. No. 94-1487 (1976), at 13, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611.

Second, in explaining its decision to exclude jury trials in such cases, Congress stated:

> Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

Id.

Finally, when explaining the decision to grant an absolute right of removal of actions to Federal court to foreign states, Congress stated:

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum . . .

H.R. Rep. No. 94-1487, at 32.

This Court recognized the Congressional intent that there be uniformity of decision in *Verlinden, supra*, at 489.

B. The Courts Have Adopted Significantly Nonuniform Procedures for Determining Whether an Entity is an Instrumentality of a Foreign State

At the time it enacted the FSIA, Congress realized that "foreign states are every day participants in commercial activities," H.R. Rep. No. 94-1487, at 7, and that the FSIA would have to recognize that fact. Congress further recognized that such commercial activity could be conducted indirectly, through state owned enterprises that "could assume a variety of forms . . ." It accordingly defined "foreign state" to include an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a) (1994), which in turn is defined as "any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b) (1994).

Although application of this definition by the courts has been straightforward where there is an entity in which there is direct majority ownership by a single government, its application has confounded the courts in two other common ownership situations. The first situation is where several different governments jointly own the entity claiming immunity, and no one government individually owns an outright majority interest. This situation has come to be referred to as a "pooling" of government interests. The second situation is where the government ownership of the entity is indirect, for example, where a government owns shares in company A,

and A in turn owns shares in the company which is claiming immunity. This situation has come to be known as a "tiering" of government interests.

With no guidance from either the FSIA or its legislative history as to how to determine the percentage of government ownership in either "pooling" or "tiering" situations, the courts have created a number of contradictory tests. Although most courts that have considered the issue allow governmental ownership interests to be pooled, the courts of the State of New York do not. See discussion at § I.B.1, *infra*. And there are currently at least three different rules in effect as to the propriety of tiering governmental ownership interests: 1) the Ninth Circuit and one court of the Southern District of New York prohibit any tiering; 2) the Seventh Circuit allows tiering at least where each entity through which the tiering is claimed itself qualifies as an instrumentality of a foreign state; and 3) the Texas state courts allow tiering *only* where each entity through which the tiering is claimed itself qualifies as an instrumentality of a foreign state. Other courts appear to allow tiering with no limitations, but have not expressly so stated. See discussion at § I.B.2, *infra*.

This action presents questions of the propriety of both pooling and tiering of governmental ownership. Petitioners are *groupement d'interet economique* ("GIE"), a unique form of commercial partnership established under French law for which there is no American equivalent.[4]

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[4] A GIE . . . is a flexible and user-friendly form of corporate structure, although it tends to baffle Anglo-Saxons — and Americans in particular — used to the rigid structure of the limited company. A GIE is not a company, and escapes many of the obligations of a company. For example, it does not have to publish accounts nor does it have to pay taxes . . . . It simply

(continued)

Petitioner Airbus Industrie was formed pursuant to a treaty among the governments of France, Germany and Spain in 1970. Airbus is composed, in part, of member companies which are partially owned by governmental entities of France, Germany and Spain.[5] The French and Spanish governmental entities each owned a majority interest in the French and Spanish member companies, Aerospatiale and CASA, respectively, but the German government entities owned only 49.25 percent of the

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(fn. continued)

> pools the capital contributed by its members, and its results are taken on to the books of its member companies in proportion to their share of the enterprise.

Matthew Lynn, *Birds of Prey - Boeing vs. Airbus: A Battle for the Skies* 113 (Four Walls Eight Windows 1997).

> In [a] sense, a GIE is an unlimited partnership in which the partners are corporations . . . . [T]he GIE formulation specifies that all partners are jointly and severally liable, up to the full extent of their resources and worth, to third parties to whom the GIE becomes contractually obligated.
>
> . . . . [A] GIE might have no proprietary capital of its own. . . . Also a GIE does not itself incur tax liability; costs, revenues, losses and profits flow through to the members, and any taxable consequences are borne by them under the laws of the state in which they themselves are incorporated. Moreover, the industrial and financial results of GIE activity are considered an integral part of the partners' overall business activities and need not be accounted for or reported separately.

David Weldon Thornton, *Airbus Industrie: The Politics of an International Industrial Collaboration* 91 (St. Martin's Press 1995). A translation of the GIE statute is attached as Appendix G.

[5] Aerospatiale and DaimlerChrysler Aerospace Airbus (formerly Deutsche Airbus) each hold a 37.9% interest in Petitioner Airbus, and CASA holds a 4.2% interest. The remaining 20% interest is held by British Aerospace (Operations), Ltd., a company in which there is no governmental ownership interest.

German member company, Deutsche Airbus.[6] The members of Aeroformation were Airbus, with a 90% interest, and a private company, Flight Safety International.

The Texas court in this action held that all three sets of governmental entities could tier their individual interests, but that pooling of those ownership interests was proper only if each of the entities through which the tiering was accomplished itself qualified as an instrumentality of a foreign state. Thus, Airbus was allowed to pool the governmental ownership interests in Aerospatiale and CASA, its French and Spanish members, but not the 49.25% ownership interest of the German governmental entities in Deutsche Airbus, the German member company. As a result, the Texas court determined that although the governmental ownership in the member companies which comprise Airbus was over 60%, Airbus itself was only 42.1% government owned, and hence did not qualify as an instrumentality of a foreign state under the FSIA and was not immune from the jurisdiction of the Texas state courts.

1. The Courts are Split on Whether Pooling of Ownership Interests by Several Foreign States is Allowed Under the FSIA

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[6] Aerospatiale was 99% owned by the French Republic, CASA was 83% owned by Spain, and Deutsche Airbus was owned 20% by the Republic of Germany, 13.46% by the State of Bavaria, 10.19% by the City of Hamburg and 5.59% by the City of Bremen, with the rest privately owned.

a. The Fifth and Seventh Circuits and the Texas State Courts Allow Pooling of Ownership Interests By More Than One Foreign State

The question of whether pooling of governmental ownership interests is allowed under the FSIA arises because the definition of "instrumentality of a foreign state" refers to the majority ownership of "a" foreign state, and excludes entities organized under the laws of a "third" country. A number of courts, including the Texas court in this action, have been faced with actions where an entity claiming immunity under the FSIA was jointly owned by multiple governments, and in which plaintiffs argued that because no one government owned a majority of ownership interest in the entity, the entity failed to meet the FSIA requirement of majority ownership by "a" foreign state. Likewise, plaintiffs have argued that because the entity claiming immunity was organized under the laws of only one of the owner states, it was organized under the law of a third country as to the remaining owner countries, and that the ownership interest of those countries must thus be excluded.

The majority of courts which have considered the issue of the pooling of ownership interests by several foreign states, including the Texas court in this action, have concluded that such pooling is allowed for purposes of determining the overall percentage of ownership of an entity by foreign states. *Mangattu v. M/V Ibn Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994); *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 938-39 (7th Cir. 1996); *Le Donne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1405-06 (E.D. Va. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981);

International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 568-69 (C.D. Cal. 1979), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981).

Those courts have generally followed the rationale that multinational entities were well known to Congress at the time the FSIA was enacted, and that denying them the protection of the FSIA would be inconsistent with the foreign relations concerns which underlay the FSIA. Further, some of the courts have noted that 1 U.S.C. § 1 (1994), expressly provides that the singular includes the plural for purposes of the Code. Thus, so long as the entity was organized under the laws of *one* of the owner states, these courts have deemed the entities not to be organized under the laws of a third country.

Petitioners believe that these cases have reached the correct result on the issue of the permissibility of pooling.

b. The New York State Courts Prohibit Pooling by More Than One Foreign State

Although the New York Court of Appeal has not considered the issue, an intermediate New York appellate court has held that pooling is not allowed. In an action involving a ship operated by a company jointly owned by several Persian Gulf nations, the court held, without any further explanation, that "[P]laintiff does not qualify as a 'foreign state' . . . since the plaintiff is . . . a company engaged in commercial activity for profit whose stock is held by at least six foreign nations." *United Arab Shipping Co. (S.A.G.) v. Salman Al-Hashim*, 176 A.D.2d 569, 570, 574 N.Y.S.2d 743, 744 (1991).

2. The Courts are Split on Whether Tiering of Ownership Interests by Foreign States is Allowed Under the FSIA

a. The Ninth Circuit Prohibits any Tiering of Ownership Interests

In *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the Ninth Circuit decided an action in which an entity, the Alberta Pork Producers Development Corporation ("Alberta Pork"), was established pursuant to a statute enacted by the Province of Alberta, Canada, to promote the marketing and sale of hogs raised in Alberta. The court had little trouble finding that Alberta Pork was an agency or instrumentality of the Province of Alberta, based on its similarities to an administrative agency. *Id.* at 1461.

The Ninth Circuit, however, reached the opposite conclusion as to Fletcher's Fine Foods, a pork processing plant in British Columbia, which was 100% owned by Alberta Pork. It reached this result by concluding that "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality." *Id.* at 1462 (emphasis in the original). Furthermore, the Ninth Circuit noted that Congress had defined agency or instrumentality as an entity owned by a foreign state or a foreign state's political subdivision, but had not expressly included ownership by an agency or instrumentality when it could have, and that the same language was used in the House Report. *Id.* at 1462.

Thus, the Ninth Circuit held that under the FSIA, *no* tiering of foreign state ownership is allowed in qualifying an entity as an agency or instrumentality. It did so

despite having found that "[t]he Act's legislative history suggests that Congress intended the term[] . . . 'agency or instrumentality' to be read broadly," *id.* at 1460, and that extending sovereign immunity all the way down the corporate chain "may very well be desirable," *id.* at 1462.

The *Gates* analysis has been followed in one trial court in the Southern District of New York. *Gardiner Stone Hunter, supra.*

b. The Seventh Circuit Allows Tiering of Ownership Interests, at Least Where Each Entity Through Which the Interest is Tiered Itself Qualifies as an Instrumentality of a Foreign State

In *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), the Seventh Circuit was faced, as was the Texas court in this matter, with the question of whether the foreign manufacturer of an aircraft that had crashed was an instrumentality of a foreign state. The manufacturer, ATR, was also a GIE created under French law to implement an international treaty, in that case between France and Italy. As in this case, the member companies of ATR were partially owned by their respective governments.[7]

The Seventh Circuit expressly rejected the reasoning of *Gates*. The *Roselawn* court found that the Ninth Circuit had engaged in semantic juggling when it held

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[7] In fact, the French member of the ATR GIE is Aerospatiale, the same company which is the French member of Airbus.

that a definition that *included* an agency or instrumentality within the definition of foreign state for all purposes within the Act but one enumerated section did not result in an agency or instrumentality *being* a foreign state. It further found that the Ninth Circuit's reading made no sense when the FSIA was read as a whole, and had apparently been motivated by the Ninth Circuit's distaste for the concept of broad immunity. It accordingly found that tiering was not prohibited by the wording of the statutory definition.

In *Roselawn,* the ownership of the Italian member by the Italian government was indirect. A majority of the Italian member company was owned by another company, a majority of which was owned by an agency of the Italian government. The *Roselawn* court adopted the reasoning of the trial court that

> so long as the corporate intermediaries standing between a foreign state and a defendant seeking to invoke foreign-state status are themselves majority-owned by a statutorily defined "foreign state" (which, to be explicit, includes an agency or instrumentality of a foreign state), such tiering of ownership interests will not deprive the defendant of foreign state status.

Id. at 939.

c. The Texas Court in This Action Adopted a Rule Allowing Tiering of Governmental Ownership Interests ONLY When Each Entity Through Which the Ownership is Tiered Itself Qualifies as an Agency or Instrumentality of a Foreign State

In this action, the Texas court rejected the reasoning of *Gates* for the same reasons the Seventh Circuit had in *Roselawn*, and determined that tiering of governmental ownership interests was appropriate. However, the Texas court recognized that *Roselawn* had not considered whether the governmental interests of a state whose interest had been tiered through an entity which itself did not qualify as a foreign state could be pooled with the interests of other states whose tiering had been completely through entities that did qualify as foreign states, as had been the case in *Roselawn*. Appendix E-17.

Petitioners urged the court to concentrate on economic reality and look to the ultimate ownership of entities such as Petitioners, i.e., who actually put up the capital for the enterprise and to whom the ultimate profits and losses would flow, for determining the percentage of ownership, rather than focusing exclusively on the business structure that had been used by the foreign states in arranging their investments. The Texas court rejected this realistic approach, and instead decided to mechanically apply the Seventh Circuit test that an entity through which a state's ownership was tiered must independently qualify as an instrumentality. It did so after stating that the decision of Congress that instrumentalities of foreign sovereigns should be entitled to sovereign immunity was inconsistent with prevailing

international law, including the law of France and Germany, and noting that its decision would limit the scope of companies that could claim sovereign immunity. Appendix E-24, E-25; 934 S.W.2d at 764-65. Because Deutsche Airbus, the German member company of Airbus, was only 49.25% owned by German governmental entities, the court therefore completely excluded the German ownership interests in Deutsche Airbus for purposes of applying the FSIA to Airbus. And, having concluded that Airbus was not an instrumentality, the court held that Airbus' 90% membership share in Petitioner Aeroformation could not be counted in determining whether it was an instrumentality, and that Aeroformation was thus also not an instrumentality.

Petitioners thus believe that the Texas court reached its decision based upon extraneous and improper considerations, rather than those specified by the FSIA.

d. Other Courts, Including the Fifth Circuit, Appear to Follow a Test for Determining the Percentage of Government Ownership of an Entity Based Upon the Ultimate Ownership of the Entity

Finally, Petitioners would note that other courts apparently follow the ultimate ownership test urged by Petitioners, although they have not expressly so held. As Petitioners noted previously, Airbus has been found to be an instrumentality of a foreign state in the Southern District of Texas, *Kern*, *supra*, and in the Southern

District of New York, *Spengel, supra*,[8] even though it would not qualify as an instrumentality under the tests adopted by the Seventh and Ninth Circuits or the Texas or New York state courts.

In an earlier appeal in this action, *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994), the Fifth Circuit indicated its apparent willingness to adopt the ultimate ownership test, referring to "the fact that the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity." *Id.* at 597-98. The Fifth Circuit noted that:

> The controlling statute, however, erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity* — not its parent — have a "majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof." [Cite]. There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

Id. at 598 n.29. However, the Fifth Circuit found that it did not have jurisdiction to hear Petitioners' appeal, because it arose from what it decided was a nonfinal order, and thus did not decide the issue. Its statement thus currently remains *dicta*.

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[8] In *Spengel*, the plaintiff and codefendant concurred that Airbus Industrie was an instrumentality of a foreign state, and thus filed no opposition to Airbus' motion to strike plaintiff's jury demand.

C. The Decision of the Texas Court is Contrary to the FSIA

1. The Texas Court Decision Arbitrarily Disregards the Rule That the FSIA and its Provisions are to be Read Broadly so as to Minimize the Risk of Irritations in Foreign Relations

As the legislative history makes clear, "[t]he broad purposes of the [FSIA] are 'to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.' " *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary on H.R. 11315*, 94th Cong. 29 (1976) (testimony of Monroe Leigh, quoting from the letter transmitting the proposed Act from the Deputy Secretary of State and the Deputy Attorney General to the Speaker of the House).

Accordingly, the courts have widely recognized that the FSIA, and its definition of a foreign state, is to be read broadly so as to fully implement its intent. *See, e.g., In re Texas E. Transmission Corp. PCB Contamination Coverage Litig.*, 15 F.3d 1230 (3d Cir. 1994); *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990); *Roselawn, supra*, at 940; *Gates, supra*, at 1460.

Although it acknowledged this principle, the Texas court believed that it applied only to the removal provisions of the Act:

> The legislative history supports a broad application of the removal provision as assuring the availability of a federal forum to promote

> procedural and substantive uniformity in the treatment of foreign sovereigns. . . . We have found no concomitant authority for the proposition that a broad interpretation of §1603(b)(2) in favor of tiering and pooling through non-majority owned intermediaries would promote any underlying purpose of the FSIA.

935 S.W.2d at 763.

The Texas court gave no further consideration to the foreign relations goals of the FSIA. It is difficult to reconcile the concept of a liberally and broadly construed right to remove to Federal court with a narrow reading of the section that defines who is entitled to assert that right. The goal of reducing potential diplomatic frictions is hardly advanced by a narrow reading of the definition of foreign state which arbitrarily deprives foreign governments of the protections of the FSIA. In this case, the Texas court in effect told three foreign countries, France, Germany and Spain, that they are not entitled to the protections of the FSIA simply because one of them owns only 49.25% of its share of an international joint venture, even though they collectively own over 60% of that venture.

2. The Decision of the Texas Court Was Based Upon Its Disagreement With the Congressionally Mandated Presumption of Immunity for the Acts of Instrumentalities of Foreign States

In 28 U.S.C. § 1604 (1994), Congress explicitly mandated that a foreign state "shall" be immune from the jurisdiction of the U.S. courts unless one of the

exceptions enumerated in the Act applies. This Court has repeatedly recognized and upheld that immunity decision:

> "Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a ... court lacks subject matter jurisdiction over a claim against a foreign state."

Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993). *See also, Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983), *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 609, 610-11 (1992). As the term foreign state includes an instrumentality of a foreign state, instrumentalities are also *presumptively* immune from U.S. jurisdiction unless one of the statutory exceptions applies.

In deciding whether Airbus was an instrumentality, however, the Texas court took pains to express its disagreement with that statutory presumption. "This presumption, however, runs contrary to the realities of the modern public commercial sector," Appendix E-24; 934 S.W.2d at 765. "Moreover, this presumption is directly contrary to the internationally recognized rule which presumes that foreign state-owned entities with separate legal personalities generally are not entitled to assert sovereign immunity." *Id.* The Texas court went on to note that neither French nor German law presumes publicly owned entities to be immune. Appendix E-24 n.9.

The Texas court clearly based its decision that Petitioners are not instrumentalities of a foreign state at least in part upon its belief that instrumentalities should not be presumptively immune.

In doing so, the Texas court not only acted contrary to Congress' express intent, but appears to have completely

lost sight of the fact that the FSIA itself *removes* the immunity for instrumentalities when they engage in commercial activities that have a direct effect in the United States.[9] As the legislative history clearly notes, the determination of whether an entity claiming to be an instrumentality can assert immunity is a two step process:

> [T]he fact that an entity is an "agency or instrumentality of a foreign state" does not itself establish an entitlement to sovereign immunity. A court would have to consider whether one of the sovereign immunity exceptions in the bill (see sections 1605-1607 and 1610-1611) was applicable.

House Report at 15. The Texas court completely disregarded this two-step analysis. Rather than first determining whether Airbus was an instrumentality based on overall ownership, as mandated by Congress, and then determining if Airbus was subject to one of the statutory exceptions, the Texas court instead first decided that Airbus should not be immune based on factors other than those specified by Congress, and then refused to recognize Airbus as an instrumentality so as to achieve that result.

This backward analysis also frustrates Congress' desire to preclude the U.S. courts from being burdened with litigation with no real connection with this country. As this Court has recognized, Congress was aware that an overly broad abolition of sovereign immunity could result in the U.S. courts becoming "an international court of claims," and expressly chose to limit the

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[9] It also ignored the fact that plaintiffs were free to sue Petitioners in India or in France, and that Petitioners could thus still be held responsible if they were found to have any liability for the crash.

abolition of sovereign immunity to claims with a substantial connection with the United States. *Verlinden*, *supra*, at 490. By deciding that Petitioners should not be immune *without* considering whether Petitioners fell within one of the statutory exceptions, the Texas court has sanctioned the litigation in a small Texas town[10] of an air crash in India in which Petitioners' alleged acts had no connection whatsoever with the United States.[11] Furthermore, that litigation is proceeding in a forum, a state court in Texas, other than that which Congress specified as a proper venue if immunity were to be denied under the FSIA.[12]

3. The Decision of the Texas Court Improperly Penalizes the German Government's Decision on How to Structure Its Investment in Petitioner Airbus Industrie, and Injects U.S. Courts into Judging Truly Sovereign Decisions

It is undisputed that if the German governmental interests in Deutsche Airbus are counted, the governmental ownership of Petitioner Airbus would exceed 60% and Airbus would qualify as an instrumentality of a

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[10] Angleton is a rural town of approximately 6,000 located 35 miles southeast of Houston.

[11] The Texas trial court found that Petitioners' alleged acts had no direct effect in the United States. Plaintiffs did not appeal that finding. Appendix E-6 n.1.

[12] Under the FSIA, the only proper venue would be a Federal court either in the District of Columbia or in the District with the most significant effects of the alleged acts of Petitioners. None of the plaintiffs have any connection with Texas, so there could be no basis for a Texas venue under the FSIA.

foreign state under the FSIA. The Texas court's decision to deny Airbus status as an instrumentality of a foreign state is thus based not upon actual ownership, but upon the manner in which the German government entities chose to organize their participation in Airbus. The German governmental entities could have decided to set up two companies to be the German members in Airbus, rather than just one company as they did, with one 100% government owned with an 18.67% share in Airbus (49.25% of Germany's overall 37.9% interest in Airbus), and the second a privately-owned company with an 19.23% share in Airbus (50.75% of Germany's overall 37.9% interest in Airbus). Had the German government entities adopted that ownership structure, there would be absolutely no difference in the amount of money put up by the German governmental entities, or the risk they bear from the enterprise of Airbus, but Airbus would qualify as an instrumentality of a foreign state under the FSIA, because the German government ownership in the 100% government-owned company would count under the Texas court's rule.

How a government decides to set up its activities is, by definition, a purely sovereign decision, and one which Congress explicitly recognized in the FSIA that the courts of this country have no right to second guess. Yet the Texas court has done just that by telling the German government entities that sovereign immunity is not available because they chose one form of organization rather than another for their participation in Airbus. This intrusion into the sovereign affairs of the German governmental entities is unwarranted and improper, and completely contrary to the intent of the FSIA that such actions be absolutely immune in U.S. Courts.

4. The Texas Court's Decision is Inconsistent With Congress' Mandate to Decide Whether an Entity is an Instrumentality by Determining Its Percentage of Foreign State Ownership

The Texas court's decision is also clearly contrary to Congress' determination that whether an entity qualifies as an instrumentality of a foreign sovereign should be based solely upon the ownership of that entity, and that all that is required to qualify is simple majority ownership. Petitioners believe that ownership should be determined in the sense in which it is commonly understood, i.e. who put up the money for the enterprise, and who is entitled to share in its distributions and ultimate net profits. As the Fifth Circuit noted, there is no bar in the FSIA to calculating ownership based on equitable or beneficial ownership. *Linton, supra*, at 598 n.29.

Here, it is undisputed that foreign states put up over 60% of Petitioner Airbus' assets, were entitled to receive over 60% of the profits from Airbus' activities, and bore over 60% of the risks of loss from Airbus' activities. This is especially true given Airbus' status as a French GIE with no assets other than those of its member companies, and where the economic results of Airbus' activities flow directly to the member companies' books based solely upon their membership percentage in the GIE.[13] In that sense, Deutsche Airbus doesn't "own" 37.9% of Airbus, it *is* 37.9% of Airbus.

The Texas court rejected Petitioners' argument by simply refusing to accept that over 60% of the profits of Airbus would flow through to governmental entities.

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[13] See footnote 4, *supra*.

This refusal was based solely upon the fact that the German governmental entities would receive less than a majority of the share of profits that would flow through to Deutsche Airbus. Appendix E-25; 934 S.W.2d at 765. In doing so, the court completely ignored the percentage shares of the profits that would flow through to the French and Spanish governments.

The economic flaw in the Texas court's rule is perhaps best illustrated by applying it to two hypothetical entities. The first hypothetical entity, "Acme," is a 50/50 partnership between government A and company C. Company C is a 50/50 partnership between government B and a private investor. Although in this hypothetical a total of 75% of Acme is clearly directly owned by the two governments, A and B, under the Texas rule, the ownership of government B in company C would be completely disregarded because it is less than a majority of C. And because the ownership of government A was not a majority of Acme, Acme would not qualify as an instrumentality of a foreign state under the FSIA.

In the second hypothetical, the entity, "Ajax," is 50.01% owned by company A, and 49.99% by private investors. Company A is in turn 50.01% owned by company B, and 49.99% by private investors. Company B is in turn 50.01% owned by company C, and 49.99% by private investors. This pattern of ownership continues on upward through seven more layers of ownership (the tiers), until it reaches company "I", which is 50.01% owned by government Z and 49.99% owned by private investors. The only government ownership in any company in the tier of companies is Z's 50.01% of "I." "I" qualifies as an instrumentality because it is directly 50.01% owned by a government. Under the Texas rule (and also under the *Roselawn* rule), each entity in the

tier of subsidiaries of "I" would also qualify as an instrumentality because of its 50.01% ownership by a parent company that qualified as an entity. The ultimate result is that Ajax would qualify as an instrumentality, even though the total share of government investment in Ajax was less than 0.1% (one tenth of a percent) of the total investment in Ajax.

These results are clearly not what was intended by Congress when it adopted the FSIA, and indicate why ultimate ownership is the only test of ownership which comports with the results Congress intended.

CONCLUSION

The decision of the Texas court in this matter is clearly erroneous, and there is a serious and broad split of authority between the courts on a question of federal law with foreign relations implications. This Court should accordingly grant the writ.

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